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Hiring Freeze File

OGC Has Reviewed

OGC 81-01256  
10 March 1981MEMORANDUM FOR : Director of Personnel Policy, Planning &  
ManagementSTAT FROM :   
Associate General CounselSUBJECT : Status of Consultants in Relation to the  
Hiring FreezeREFERENCE : Memo of Law, entitled OMB Bulletin 81-6, 24  
January 1981 -- Federal Civilian Hiring  
-- Application to CIA dated 6 February 1981

1. This is in response to your inquiry as to whether the President's hiring freeze as contained in his 20 January 1981 memorandum and as further implemented by the Office of Management and Budget Bulletin No. 81-6 dated 24 January 1981 restricts the Agency's use of consultants.

2. OMB Bulletin 81-6 after clearly referencing the President's directive that "a total freeze be placed on the hiring of Federal civilian employees in the Executive Branch," (Emphasis added) orders, with certain exceptions not relevant here, Executive departments and establishments to immediately stop all hiring. The OMB Bulletin further notes that "the hiring limitations applies to all types of appointments, temporary as well as permanent." (Emphasis added.) In a separate provision the Bulletin provides that "contracting with firms and institutions outside the Government will not be used to alleviate or circumvent the effect of the hiring freeze.

3. The above language dealing as it does with "employees" and "appointments" is not interpreted to mean that the Agency cannot continue to utilize the services of consultants or independent contractors. The OMB Bulletin requires only that contracting for services which would normally be performed by employees in positions subject to the freeze must be avoided. In short any subterfuge following the letter but not intent of the freeze will not be tolerated. On the other hand, contracting for services that are not a replacement for employee positions under the act remains unaffected.

4. The Director of Central Intelligence has historically made use of certain panels of consultants who are by no means federal employees, although they receive fees and expenses from the Agency. We do not believe that the Director would be prohibited by the freeze directive from asking a new consultant to fill a vacancy on such a panel. Other officials dealing with particular countries or functional specialities might call in experts in a consultant/independent contractor capacity to give advice or to evaluate a particular document or problem and this would not be prohibited by the OMB Bulletin. The Office of Training has engaged experts and consultants to participate in certain courses as independent contractors. We do not believe that the freeze directive prohibits this practice either.

5. The key to determining whether use of a consultant continues to be appropriate under the freeze guidance does not depend on mere labeling. It is not sufficient that an individual consultant be called an independent contractor instead of an employee. Rather it is necessary that the underpinnings of the relationship be examined. Independent contractors are self-employed individuals who are engaged under contract to provide specific services. They are not supervised or directed in their work by U.S. Government personnel, and the Government has no right of control over the means, manner, or details by which the agreed-upon services are performed. Moreover, the consultant, who sells his services to the Agency in the capacity of an independent contractor is not appointed to a position in the federal civil service, would not perform duties of a supervisory or administrative nature for the Agency, and would not engage in any other type of operational activity except as incidental to the performance of the advisory function. Once it has been determined as a matter of law that the consultant is an independent contractor it also must be determined that the individual is not being engaged as a substitute for an employee or to alleviate or circumvent the effect of the hiring freeze. Past practice of the Agency with regard to use of consultants would be persuasive.

6. This Office is prepared to assist in determining whether or not consultants who are to be engaged during the hiring freeze do not fall within OMB prohibition.



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